STATE OF MICHIGAN

IN THE SUPREME COURT

ARTHUR JARRAD,

Plaintiff-Appellee,

v.

INTEGON NATIONAL INSURANCE COMPANY, ~~a foreign insurer, a GMAC INSURANCE COMPANY~~,

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 245068

Ingham County Circuit Court
No. 00-92678-NF

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NOTICE OF HEARING

DEFENDANT-APPELLANT, INTEGON NATIONAL INSURANCE COMPANY'S, APPLICATION FOR LEAVE TO APPEAL

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QUESTION PRESENTED FOR REVIEW

Where wage-loss benefits are paid under a self-insured long-term disability plan -- in all respects equivalent to a long-term disability insurance policy, does entitlement to such benefits constitute "other health and accident coverage" within the meaning of §3109a of the No-Fault Act, so as to effectuate an insured's election of lesser-premium "coordinated" no-fault coverage and avoid wasteful double compensation for the insured's wage loss?

The Circuit Court answered, "No."

The Court of Appeals answered, "No."

Plaintiff JARRAD would answer, "No."

Defendant INTEGON answers, "Yes."

JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Defendant-Appellant, INTEGON NATIONAL INSURANCE COMPANY, seeks leave to appeal from the Court of Appeals' opinion, dated January 27, 2004 (**Exhibit 1**). A timely filed motion for rehearing was denied by order of April 1, 2004 (**Exhibit 1**).

The Court of Appeals' opinion (with one judge dissenting) upheld the circuit court's grant of summary disposition in favor of Plaintiff, Arthur Jarrad, which held that Plaintiff's receipt of long term disability benefits for his loss of wages did not constitute "other health and accident coverage" under MCL 500.3109a, such that Defendant was required to pay full no-fault work loss benefits to Plaintiff unreduced by the amount of his LTD benefits. As a consequence of this ruling of the circuit court, the parties then resolved the dollar amounts of Plaintiff's claims and reduced the recovery to final judgment on October 31, 2002 (**Exhibit 2** -- Judgment for Plaintiff, Arthur T. Jarrad, 10/31/02). A corrected judgment was entered soon after to correct a clerical error (regarding approval "as to form and substance") (**Exhibit 2** -- Amended Judgment for Plaintiff, Arthur t. Jarrad, 11/18/02).

For the reasons stated herein, the Court is requested to reverse the decision of the Court of Appeals and order that summary disposition be granted in favor of Defendant. The Court is urged, in lieu of granting leave to appeal, to endorse and adopt the dissenting opinion of Judge Brian K. Zahra. Alternatively, the Court is urged to grant leave to appeal and, upon full consideration of the merits, hold that Plaintiff's entitlement to long term disability benefits from his employer-provided self-insured disability plan does constitute "other health and accident coverage" within the meaning of §3109a of the No-Fault Act,

such that Defendant properly coordinated those benefits with its payment of no-fault work loss benefits in this matter.

INTRODUCTION:
WHY RELIEF FROM THIS COURT SHOULD BE GRANTED

The question presented for review is an issue of law. The parties do not dispute that Plaintiff-Appellee, Arthur Jarrad, is covered for no-fault automobile insurance under a reduced-premium "coordinated" policy issued by Defendant-Appellant, Integon National Insurance Company. Nor do they dispute that injuries Plaintiff sustained in a motor vehicle accident caused him to be disabled from work beginning June 27, 1999 (the date of the accident), thus entitling Plaintiff to no-fault work loss benefits. Nor, finally, is there any dispute that, through his employment with the State of Michigan Department of Corrections, Plaintiff received wage replacement ("long term disability") benefits from the Michigan Department of Civil Service "Self-Funded Long Term Disability Benefits Plan" as a result of his accident-related injuries.

What is in dispute is whether the disability benefits Plaintiff received are subject to set-off under the no-fault act as a type of "other health and accident coverage" within the meaning of MCL 500.3109a. Defendant submits that the long term disability plan under which Plaintiff received his benefits is in every respect equivalent to typical disability insurance, and thus is subject to coordination under §3109a. *See, Rettig v Hastings Mutual Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992). Jarrad contends (and the lower courts

ruled) that he is entitled to unreduced (and thus duplicative) benefits from the no-fault insurer because disability benefits are not subject to coordination.

The specific question to be answered is whether the protection afforded under a self-insured disability benefits plan (**Exhibit 4A**), under which an injured party receives monthly income benefits following a disabling accident, constitutes "coverage" within the meaning of MCL 500.3109a of the No-Fault Act. Defendant seeks a clear statement from this Court that it does. This question has not been answered by any published Court of Appeals opinion; the Court in this case erroneously answered in the negative.

The employer-provided LTD benefits plan in this case is funded via self-insurance rather than through payment of premiums to another company (Aetna Insurance Company administers the plan and processes claims, but the plan is self-funded by payroll and employer contributions); but the plan is materially equivalent to typical insurance coverage as to constitute "other health and accident coverage" under §3109a.

The position advocated by Plaintiff, and now endorsed by the Court of Appeals, is that a disability wage loss plan that pays benefits out of self-insurance, as opposed to one whose benefits are paid by a third-party insurance company, cannot constitute "other health and accident coverage." This position is based on a misreading of the applicable case law, and ultimately is untenable in that self-insurance coverage plans generally are regarded as equivalent to "insurance" (*see*, *Allstate Ins Co v Elassal*, 203 Mich App 548, 554-555; 512 NW2d 856 (1994); also, *see*, MCL 418.601 -- employers financially capable of carrying their own risk qualify as "self-insured" for purposes of mandatory workers' compensation insurance).

Indeed, the position is directly inconsistent with case law *applying §3109a of the no-fault act* that benefits paid by employers through self-insured employee benefit funds *do* constitute "other health and accident coverage" and thus are subject to coordination of benefits. *Lewis v Transamerica Ins Co*, 160 Mich App 413, 418-419; 408 NW2d 458 (1987); *Michigan Millers Mutual Ins Co v West Michigan Health Care Network*, 174 Mich App 196; 435 NW2d 423 (1988); *Auto-Owners Ins Co v Lacks Ind, Inc*, 156 Mich App 837; 402 NW2d 102 (1986), *lv den*, 428 Mich 902 (1987). The Court of Appeals provided no persuasive basis for finding these cases, which dealt not with wage loss benefits but medical expense benefits, materially distinguishable.

Whether disability benefits are paid by an "insurance company" in exchange for employer/employee premium payments, or directly by an employer's self-insured plan funded by employer/employee contributions, is not dispositive of the issue presented. Nor is it material whether the employer is compelled by a collective bargaining agreement to provide its employees with a long term disability benefits package.

Rather -- indeed, as the Court of Appeals recognized -- the "dispositive distinctions" between wage benefits that *are* subject to no-fault coordination and those that are *not*, are (1) whether the benefits are paid directly by an employer rather than out of a coverage plan, and (2) whether they are paid pursuant to the terms of an agreement (collectively bargained or otherwise) between the employer and employee rather than pursuant to a separate coverage policy or plan (*see*, **Exhibit 1**, slip op., at 2, *citing Rettig*, 196 Mich App at 333).

Yet, having identified the key factors in the inquiry, the Court of Appeals' majority fundamentally erred (and glaringly so, Defendant submits) in aligning Plaintiff Jarrad's

wage benefits with those in *Spencer* instead of in *Rettig*. The decision thus is based squarely on the premise that Jarrad's benefits from the "Self-Funded Long Term Disability Benefits Plan" *are* paid by the employer and *are* paid pursuant to a collective bargaining agreement ("dispositive distinctions"). Neither of these fundamental predicates, however, is true.

The benefits Plaintiff Jarrad received were *not* paid by his employer; they were paid out of a self-insurance pool of funds organized under a formal Plan Document, as administered by Aetna Life Insurance Company, and comprised of payroll contributions from employees across the state -- materially analogous to insurance premiums. It is not accurate, therefore, to suggest that Jarrad's "employer" paid these benefits, like the employer did in *Spencer*.

Nor is it accurate to state that the benefits Plaintiff received were paid "pursuant to a collective bargaining agreement"; in fact, they were *not* paid pursuant to a collective bargaining agreement (**Exhibit 4B**), they were paid pursuant to the "Plan Document" for the Michigan Department of Civil Service's "Self-Funded Long Term Disability Benefits Plan" (**Exhibit 4A**). Plaintiff's affiant, an administrator of the LTD Plan, affirmatively acknowledged as much: "Payments [are] made to eligible State employees **pursuant to the Plan**" (**Exhibit 4** -- Affidavit of Ken Swisher, ¶5).

No-fault coordination with "other health and accident coverage" must be construed consistently to encompass self-funded health and disability plans, including those providing for wage loss protection. If not, then not must the numerous published cases addressing self-insured plans for medical expense coverage simply be ignored, but, further, employees throughout the State of Michigan who are covered for health and/or disability benefits

through self-funded plans will *not* have "other health and accident coverage" with which to coordinate their no-fault coverage. Such a state of law would (1) deprive them of the option of purchasing less expensive coordinated no-fault coverage (*see*, §3109a), and (2) inevitably result in the wasteful, double-payment of benefits §3109a was specifically enacted to avoid.

Plaintiff Jarrad did purchase less expensive coordinated no-fault insurance coverage on the basis that he ostensibly had "other health and accident coverage" that would pay benefits on a primary basis in any automobile accident-related disability. Plaintiff received those benefits in this instance from his employer-provided, self-funded disability plan. The lower courts erred in disallowing Defendant's setoff under §3109a and the terms of its coordinated coverage. This Court should grant review and either summarily reverse the Court of Appeals for the reasons stated in that court's dissenting opinion, or grant leave to appeal.

STATEMENT OF FACTS AND PROCEEDINGS

On June 27, 1999, Plaintiff, Arthur Jarrad, was involved in an automobile accident that resulted in injuries that left him disabled from his job as a State of Michigan corrections officer at the Huron Valley Men's Facility, Ypsilanti, Michigan (Plaintiff's Motion for Partial Summary Disposition, ¶2, 3/4/02). Plaintiff was insured at the time under a policy of no-fault automobile insurance issued by Defendant, Integon National Insurance Company (**Exhibit 3** -- excerpts of Plaintiff's no-fault policy with Integon).[1]

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[1] The complete policy and declarations pages were submitted below as an attachment to Defendant's Response to Partial Motion for Summary Disposition and Request for Summary

The policy Plaintiff elected to purchase from Integon provided for coordination of benefits, such that both its wage loss benefits and medical expense benefits (*see*, **Exhibit 3**, declarations page) were secondary to whatever other "health and accident coverage" is available to the insured, within the meaning of MCL 500.3109a. The no-fault policy's coordination clause for wage loss states as follows (**Exhibit 3**, page 6):

> B. We do not provide Personal Injury Protection Coverage for:
>
> * * *
>
> 2. Work loss for you or your family member:
>
> a) to the extent that similar benefits are paid or payable under any other insurance, service, benefit or reimbursement plan; and
>
> b) if Coordination of Benefits for work loss is indicated in the Declarations Page.

Plaintiff Jarrad applied for and received no-fault wage loss benefits from Defendant Integon for the full three-year period following the accident.[2] In making its payments of these benefits, Defendant applied the aforesaid coordination of benefits clause and reduced its no-fault benefit in accord with Plaintiff's receipt of long term disability benefits from his employer-provided LTD plan (Plaintiff's Motion, ¶7; Defendant's Response, 3/20/02, p. 2).

The nature of the plan at issue, "The Self-Funded Long-Term Disability Benefits Plan Provided for Certain Eligible State Employees" (**Exhibit 4A**, p. 1), is summarized in the Affidavit of Ken Swisher (**Exhibit 4**) and is detailed in the plan document itself (**Exhibit 4A**) (provided below with Plaintiff's Motion). The employer's promise to provide

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Disposition Pursuant to MCR 2.116(I)(2), 3/20/02.

[2] Plaintiff's Motion for Partial Summary Disposition, ¶¶3, 6, 7; Defendant's Response to Plaintiff's Motion, 3/20/02, p. 2. Under MCL 500.3107(1)(b), no-fault wage loss benefits are payable for up to 3 years after an accident.

such a plan for the benefit of its employees, on the other hand, is contained in a separate document, to wit, the collective bargaining agreement between the state-employer and the bargaining unit to which Plaintiff belongs (**Exhibit 4B**) ("The employer agrees to continue the Long Term Disability Insurance coverage in effect on December 31, 1998") (*id.*). As is detailed in the accompanying argument, Plaintiff's actual entitlement to benefits is established not under any term in the collective bargaining agreement, but under the terms of the Self-Funded Long Term Disability Benefits Plan Document.

The parties agree that, given Plaintiff's earnings of approximately $4,500 to $5,000 per month at the time of his accident,[3] Plaintiff would be entitled to the maximum rate for no-fault work loss benefits of $3,688.00 per month, subject to any applicable set-offs or reductions for coordination of benefits (Plaintiff's Motion, ¶6; Tr 3/27/02, p. 9). It has been, and is, Defendant's contention that Plaintiff's LTD benefits qualify under the no-fault policy's coordination clause as "similar benefits ... under any other insurance, service, benefit or reimbursement plan" (**Exhibit 3**, p. 6), constituting "other health and accident coverage" under MCL 500.3109a.

After his accident Plaintiff applied for and was found to be entitled to benefits under the state employees long term disability benefits plan. Based on a formula set forth in the plan document (⅔ of basic monthly earnings, up to a maximum of $3,330.36), Aetna

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[3] Plaintiff's Motion for Partial Summary Disposition, Exhibit 1 -- Statement of Earnings; Plaintiff's Brief in Support of Motion, p. 1 ("Mr. Jarrad's ... average monthly wage, including overtime, equaled approximately $4,688.02 dollars"). Also, Tr 3/27/02, p. 9.

Insurance calculated and administered payment to Plaintiff a wage loss benefit in the amount of $2,220.24 per month (**Exhibit 5** -- formal letter qualifying Plaintiff to receive benefits).[4]

Meanwhile, Defendant paid Plaintiff a coordinated no-fault benefit of $1,467.76 per month for the 36 months following the accident, taking into consideration the maximum no-fault work loss benefit of $3,688.00 per month and Plaintiff's concurrent entitlement to $2,220.24 per month in disability benefits.[5] Absent coordination of these benefits, Plaintiff would receive full LTD benefits and full, unreduced no-fault benefits, for a combined total of $5,908.24 per month -- at least $1,000.00 *more* than his actual monthly earnings.

Plaintiff filed a Motion for Partial Summary Disposition on March 4, 2002, seeking a legal ruling on whether Plaintiff's receipt of LTD benefits qualified as "other health and accident coverage" under MCL 500.3109a so as to allow Defendant to reduce its no-fault work loss benefit to that extent under its coordination of benefits clause. Defendant responded, likewise seeking a dispositive ruling on the issue in its favor (Defendant's Response to Partial Motion for Summary Disposition and Request for Summary Disposition Pursuant to MCR 2.116(I)(2), 3/20/02). The court ruled in favor of Plaintiff and entered its "Order Granting Plaintiff's Motion for Partial Summary Disposition and Denying Defendant's Counter-Motion for Partial Summary Disposition" (4/15/02).

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[4] The document was submitted in the trial court as Exhibit 3 to Plaintiff's Motion. Also, Plaintiff's Brief in Support of Motion, p. 3.

[5] Plaintiff's Motion, ¶¶6-7; Defendant's Response, p. 2. Because of a calculation error resulting in a larger setoff than was warranted, Defendant initially underpaid Plaintiff by $58.00 per month (Plaintiff's Brief in Support of Motion, pp. 3-4). The parties amicably resolved and rectified this error, with Defendant fully reimbursing Plaintiff the difference, with interest. The issue that remained, presented to the Court of Appeals and now to before this Court, concerns the set-off of the disability benefits from the no-fault work loss benefits.

The parties thereafter amicably resolved the amounts of Plaintiff's remaining claims and reduced them to a final judgment on October 31, 2002. A corrected judgment was entered soon after to correct a clerical error (regarding approval "as to form and content") (Exhibit 2). Defendant timely appealed to the Court of Appeals.

In a 2-1 opinion issued January 27, 2004 (**Exhibit 1**), the Court of Appeals affirmed. Concluding that Plaintiff Jarrad's receipt of benefits from the Michigan Department of Civil Service "Self-Funded Long Term Disability Benefits Plan" was not subject to coordination as "other health and accident coverage" under §3109a, the Court focused its analysis on the precedent of *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389; 445 NW2d 520 (1989), and *Rettig v Hastings Mut Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992).

Both cases (*Spencer* and *Rettig*) involved whether benefits received by the plaintiff, which compensated for loss of wages, were subject to coordination under the plaintiff's no-fault insurance coverage. Coordination was allowed in *Rettig*, and disallowed in *Spencer*. In its opinion in the case at bar, the Court of Appeals properly observed that no-fault coordination was not appropriate in *Spencer* because (1) the employer-provided "benefits" (partial wage continuation) were paid directly by the employer, and (2) they were paid pursuant to the terms of a collective bargaining agreement. key distinctions in *Rettig* that rendered coordination with no-fault appropriate, the Court continued, were that "the benefits were *not* paid by the plaintiff's employer and were *not* paid pursuant to a collective bargaining agreement -- dispositive distinctions." (**Exhibit 1** -- slip op., at 2).

As detailed in the ensuing discussion, Defendant concurs with the Court of Appeals' view that these two factors are the dispositive considerations, and that the case at bar, in

essence, turns on whether Plaintiff Jarrad's coverage under his "Self-Funded Long Term Disability Benefits Plan" is legally equivalent to the plaintiff's disability coverage in *Rettig* or the plaintiff's entitlement to wage continuation benefits in *Spencer*. Defendant submits, however, that the Court fundamentally erred in concluding that this case "is more like *Spencer* than *Rettig* (slip op., at 2). A timely filed motion for rehearing was denied, again by a 2-1 vote, on April 1, 2004 (**Exhibit 1**).

Now in support of its request for relief in this Court, Defendant respectfully submits this application for leave to appeal.

ARGUMENT

BECAUSE PLAINTIFF'S ELIGIBILITY FOR COVERAGE UNDER A SELF-INSURED LONG TERM DISABILITY PLAN CONSTITUTES "OTHER HEALTH AND ACCIDENT COVERAGE" SUBJECT TO COORDINATION OF BENEFITS UNDER MCL 500.3109a, AND PLAINTIFF ENJOYED A REDUCED NO-FAULT PREMIUM BY ELECTING EXCESS-ONLY WAGE LOSS COVERAGE, THE LOWER COURTS ERRED IN DISALLOWING DEFENDANT TO SET-OFF PLAINTIFF'S DUPLICATIVE LTD BENEFITS FROM ITS NO-FAULT WAGE LOSS PAYMENTS.

Standard of Review

The Court of Appeals' ruling being challenged in this application is its affirmance of a trial court's decision on the parties' cross-motions for summary disposition. On the basis of undisputed facts, the issue presented was a matter of statutory construction and application of law. The motions were brought under MCR 2.116(C)(10) (and MCR 2.116(I)(2)) on grounds that there are no genuine issues of material fact. Rulings on

such motions are reviewed on appeal under the de novo standard of review. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). Further, the issue presented and decided below was one of statutory interpretation, which constitutes an issue of law and is reviewed de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

Introduction

There is no dispute that Plaintiff Jarrad had coverage for wage loss benefits under Defendant Integon's no-fault insurance policy. There is also no dispute, however, that by virtue of Defendant's policy being coordinated for both medical and wage loss benefits pursuant to MCL 500.3109a, Defendant's coverage is only secondary to any "other health and accident coverage on the insured" with respect to the subject loss. Therefore, "to the extent that similar benefits are paid or payable" for Plaintiff's protection against loss of earnings due to the accident (*see*, **Exhibit 3**, p. 6), Defendant's liability is diminished by his receipt of such benefits.

Defendant contends that Plaintiff's eligibility for benefits under his employer's "Self-Funded Long Term Disability Benefits Plan"does indeed constitute such "other health and accident coverage," that it was entitled to apply Plaintiff's receipt of such benefits under its coordination of benefits clause to reduce its own liability for benefits, and that the courts below erred in ruling otherwise.

In *Rettig v Hastings Mutual Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992), the Court held that long term disability benefits provided as an employee benefit are subject to coordination of wage loss benefits under §3109a. Defendant submits that this case controls,

since the only difference between that case and this one, the fact that the benefits in *Rettig* were paid out of an insured plan, while the State of Michigan LTD plan in this case is self-funded, is not a legally *material* difference.

Nor do the cases on which Plaintiff has relied, principally *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389; 445 NW2d 520 (1989), hold otherwise. To be sure, where an employer, as part of the employment agreement (whether collectively bargained or otherwise) makes a promise to continue paying wages during a period of disability, the reliability of this promise is not akin to typical insurance coverage; and when wage continuation benefits are paid pursuant to such a promise in the employment agreement, they are *not* paid pursuant to an insurance policy or insurance-type plan. *See*, *Auto-Owners Ins Co v Farm Bureau Mutual Ins Co*, 171 Mich App 46, 51; 429 NW2d 637 (1988) (referencing coordination with other "insurance-type" health and accident coverages).

Plaintiff Jarrad, however, did not receive his long term disability benefits "pursuant to" a promise in his employment agreement (even if the collective bargaining agreement did require the employer to provide a coverage plan). Rather, he received his benefits "pursuant to" the terms of coverage contained in a Long Term Disability Benefits Plan, which indisputably "corresponded to the typical ... insurance plan generally provided as a benefit of employment." *Spencer*, 179 Mich App at 398.

As is detailed in the attached **Exhibit 4**, Plaintiff's position as a Corrections Officer with the State of Michigan entitled him to coverage under the State's "Self-Funded Long Term Disability Benefits Plan." The plan provides coverage that is identical to any sickness

and accident insurance policy providing wage loss benefits, except that the State funds the risk directly (i.e., self-insured) rather than paying premiums to another entity (insurer) to accept the risk. The "plan" thus clearly constitutes "other health and accident coverage" within the meaning of §3109a of the no-fault act.

A. Coordination of Benefits Under the No-Fault Act

Michigan's no-fault insurance act requires that all owners or registrants of a motor vehicle maintain no-fault coverage for their vehicles if they are to be driven on the highways of the state. MCL 500.3101(1). Because the insurance is compulsory, public policy demands that no-fault premiums be kept as low as possible. *Gregory v Transamerica Ins Co*, 425 Mich 625, 631-632; 391 NW2d 312 (1986); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 549, 567; 273 NW 2d 829 (1979).

This case concerns application of MCL 500.3109a, which reflects even a greater policy concern for affordable premiums in that the further cost reduction is specifically mandated by statute.[6] *Federal Kemper Ins Co v Health Ins Admin*, 424 Mich 537, 549; 383

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[6] In full, the statute provides:

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and to any relative of either domiciled in the same household. [MCL 500.3109a.]

There is no dispute that the policy in this case is a reduced-premium policy providing for coordinated coverage for both wage loss benefits and medical expense benefits.

NW2d 590 (1986); *Transamerica Ins Group v American Community Mut Ins Co*, 175 Mich App 377, 382; 437 NW2d 28 (1989). *Accord, LeBlanc v State Farm Mut Ins Co*, 410 Mich 173, 202-203; 301 NW2d 775 (1981) (the legislature intended to give "unrestrained application of §3109a to health and accident coverage from whatever source"); *Lewis v Transamerica Ins*, 160 Mich App 413, 418-419; 408 NW2d 458 (1987) (to accomplish reduction of no-fault insurance costs by obviating duplicative benefits, the legislature in §3109a "purposefully used the broad term 'coverage' rather than 'insurance' in describing health and accident benefits available to the insured independent of the no-fault contract").

Michigan courts have thus emphasized the importance that coordination of benefits provisions in no-fault policies be given full effect to promote the cost-saving purposes for which they were mandated:

> By mandating that no-fault insurers offer coordination of benefit clauses at appropriately reduced rates, the Legislature expressed a clear intent that the no-fault insurer not have primary liability under any circumstances when the insured elects to coordinate benefits.

Transamerica Ins Group, 175 Mich App at 382-383 (emphasis added).

With regard to work loss benefits in particular, there can no longer be any doubt that such coverage, just like medical expense coverage, is subject to coordination of benefits under the no-fault act. *Rettig v Hastings Mutual Ins Co*, 198 Mich App at 333 (long term disability benefits received from insurer as benefit of employment was "other health and accident coverage" because "they constitute protection typically provided by health insurance plans, which include payments for medical expenses resulting from an accident as well as wage-loss replacement benefits"); *Zmudczynski v League General Ins Co*, 99

Mich App 442; 297 NW2d 696 (1980) (setting forth method of calculating set-off of sickness and accident wage loss benefits from coordinated no-fault insurance benefits).

Quoting the legislative history regarding the cost-saving purpose of the bill that became §3109a of the no-fault act, the Supreme Court dispelled any doubt that wage loss coordination shares the same status as medical expense coordination:

> "The bill would make it possible to eliminate the current situation in which persons insured under accident and health policies which include medical expense and loss of wages benefits may collect benefits from such coverage and from their no-fault personal protection benefits."

LeBlanc v State Farm Mut Ins Co, 410 Mich at 195 (emphasis added).

B. Neither the self-insured nature of the Long Term Disability Benefits Plan or the fact that its existence is compelled by a collective bargaining agreement defeats its essential nature as "other health and accident coverage."

It has been Plaintiff's contention that wage loss benefits paid directly by a self-funded employer-provided plan rather than a third-party "insurance policy" are not subject to coordination under the no-fault act; that is, coverage from a self-insured employee benefits plan does not constitute "other health and accident coverage" within the meaning of §3109a. Case law, however, as well as the clear public policy, directly conflicts with this contention.

In *Lewis v Transamerica Ins Co*, *supra*, a motor vehicle accident victim was covered both by a coordinated no-fault insurance policy and a self-funded employee benefit plan through his union. The issue was whether the coverage payable under the plan agreement constituted "other health and accident coverage" within the meaning of §3109a. This Court

held that, even though the plaintiff's benefits were not technically paid from "insurance," they nevertheless were "other health and accident coverage":

> The intent of the Legislature in enacting §3109a of the no-fault act was to reduce insurance costs by obviating the potential for double recovery. [Citation omitted] To accomplish this end, the Legislature purposefully used the broad term "coverage" rather than "insurance" in describing health and accident benefits available to the insured independent of the no-fault contract.

Lewis, 160 Mich App at 418-419; *accord*, *Spencer*, 179 Mich App at 398 (recognizing that the scope of coverages within §3109a "has expanded").

The court in *Lewis* relied in part on *USF&G v Group Health Plan*, 131 Mich App 268; 345 NW2d 683 (1983), which involved a health maintenance organization. Arguing that the HMO did not provide "other health and accident coverage," the defendant relied upon the unique features that distinguish an HMO from ordinary health insurance. In response, this Court stated, "Under traditional definitions, a health maintenance organization does not sell insurance. [] But MCL 500.3109a; MSA 24.13109(1) does not refer to 'insurance' but to 'health and accident coverage'" (emphasis added). Thus, §3109a again was held to apply. *Accord*, *DSS v American Commercial Liability Ins*, 435 Mich 508, 512-513, n. 10; 460 NW2d 194 (1990) (identifying a "variety of contexts" in which §3109a has been held to apply).

Nor do the cases of *Orr v DAIIE*, 90 Mich App 687; 282 NW2d 177 (1979), and *Spencer v Hartford Accident & Indemnity Co*, *supra*, support the proposition that benefits paid directly by an employer do *not* qualify as "other health and accident coverage." In *Orr*, the plaintiff received wage replacement benefits from an employer "sick bank" program that

did not resemble typical insurance coverage in any way. The program was such that the plaintiff would earn eight hours of sick leave for each month worked, and these hours of sick leave would accrue indefinitely. Anytime the employee was off work sick, he would receive his pay (to the extent he had credits in the "bank"). To the extent these sick bank hours were unused at retirement or separation from employment, the employee would receive a financial payment in accordance with the hours saved.

The *Orr* court found that this sick bank program was not "health and accident coverage" because the accrued sick leave days had an economic value to the plaintiff if unused, and because the program was essentially undependable since the credits could be depleted. *Orr*, at 689. Since it was not "actuarially sound," the program was not in the nature of typical insurance coverage. *Id*, at 690-691. The holding, therefore, was not based on the lack of "insurance" so much as it was based on the lack of any insurance-like coverage involved.

The same is true for *Spencer v Hartford Accident & Indemnity Co*, *supra*. Specifically relying on *Orr*, the court in *Spencer* was faced with a partial wage continuation plan which was neither insured nor in the nature of typical insurance coverage. Rather, in compliance with a specific point in a collective bargaining agreement, the employer-township supplemented the plaintiff's workers' compensation benefits to bring such benefits up to the actual wage level of the employee. The benefits were paid directly pursuant to a term in the collective bargaining agreement; there was no separate disability insurance *or insurance-like disability plan* at all. 179 Mich App at 391, 392.

While the *Spencer* opinion appears to equate "other health and accident coverage" to other "insurance coverage," it is clear that the court was referring to other coverage in the nature of insurance. It directly acknowledged that benefits received from an employer's "self-insurance health plan" qualifies as "other health and accident coverage," and characterized the pertinent inquiry as being whether the benefits at issue correspond to typical insurance plans generally provided as a benefit of employment. 179 Mich App at 398 (emphasis added).[7]

Here, the plan under which Plaintiff received his LTD benefits is administered by Aetna Insurance Company (*see*, **Exhibit 4A**, p. 2), but the risk pool is funded by employer and eligible employee contributions (*see*, **Exhibit 2**, ¶4). These contributions, Defendant submits, are directly analogous to the premiums that were paid by the plaintiff in *Rettig* through payroll deductions. 196 Mich App at 330. Despite the self-funded nature of the plan in this case, then, it nevertheless provided coverage to Plaintiff and corresponds directly to typical insurance coverage.

The Court of Appeals, in previous cases, consistently held other employee benefit plans that are fully self-funded (that is, not utilizing any insurance coverage) to be "other health and accident coverage" just as if the plans had insurance. In *Michigan Millers Mutual Ins Co v West Michigan Health Care Network*, 174 Mich App 196; 435 NW2d 423 (1988),

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[7] Plaintiff has also asserted that *Wesolek v City of Saginaw*, 202 Mich App 637; 509 NW2d 546 (1993), supports his "other health and accident coverage" argument. This is not so. While factually the case is identical to *Spencer*, *supra*, coordination of benefits under §3109a is not addressed in the opinion. Rather, only coordination under MCL 500.3109(1) is addressed (regarding benefits required to be provided under state or federal law). Defendant does not contend that Plaintiff's LTD benefits fall under §3109(1).

David and Barbara White not only were covered by the no-fault insurance policy but "were also ***covered*** by a medical plan issued by defendant employee benefit plan." 174 Mich App at 198 (emphasis added). The court found §3109a applicable, even though the benefit plan was fully "employer-funded"--that is, it was "self-insured" (the terms were used interchangeably). *Id*, at 200-201.

Likewise, in *Auto-Owners Ins Co v Corduroy Rubber Co*, 177 Mich App 600; 443 NW2d 416 (1989), the employee benefit plan "indicate[d] that the benefits involved here were self-funded by the employer," *id*, at 602, yet the Court found §3109a applicable to render the employee benefit plan primary and the coordinated no-fault coverage secondary. *Accord, Auto-Owners Ins Co v Lacks Industries, Inc*, 156 Mich App 837; 402 NW2d 102 (1986), *lv den*, 428 Mich 902 (1987) (even though the employee benefit plan was "self-insured," that is, benefits were paid directly by the employer rather than by an insurer, the Court found §3109a applicable and, indeed, referred informally to the benefit plan as "health insurance"). Also *see*, *Allstate Ins Co v Elassal*, 203 Mich App 548, 554-555; 512 NW2d 856 (1994), and MCL 418.601 (employers financially capable of carrying their own risk qualify as "self-insured" for purposes of mandatory automobile liability and workers' compensation insurance).

That self-funded coverage plans constitute "coverage" no less than plans utilizing premium-paid insurance policies is also illustrated in *Gogebic Community College Mich Ed Assoc v Gogebic Community College*, 246 Mich App 342; 632 NW2d 517 (2001). In that case a the plaintiff, a collective bargaining group, was entitled to employer-provided dental "coverage" under its collective bargaining agreement. The group had always been provided

with dental insurance coverage pursuant to the agreement, but objected when the employer chose to switch to a self-funded plan. This Court ruled in favor of the College (employer), holding that the decision to self-insure was permissible since the collective bargaining agreement did not specify a particular carrier for the provision of dental "coverage," 246 Mich App at 350-351, and expressly rejecting the union's claim "that the employer's change to a self-funded dental plan materially altered the employees' existing benefits." 246 Mich App at 355, n. 2.

In this case, unlike *Spencer*, Plaintiff did *not* receive benefits "pursuant to a collective bargaining agreement" (179 Mich App at 391); rather, he received "monthly long term disability payments under the Long Term Disability Plan". Payments under the "Plan" are made to eligible employees *not* pursuant to a collective bargaining agreement (*compare*, *Spencer*, at 392) but "pursuant to the Plan" (Affidavit of Ken Swisher, **Exhibit 4**, ¶5). Even though the terms of employment between Plaintiff and his employer are set forth in a collective bargaining agreement (**Exhibit 4B**), the insurance-like coverage plan from which Plaintiff receives his LTD benefits is an entirely separate document and entity.

Finally, the LTD Plan is irrefutably similar to typical insurance coverage. Again, while the risk-pool is funded by employer-employee contributions rather than premiums, the Plan is administered by the Aetna Insurance Company, which "process[es] all claims in the MDCS's behalf" (**Exhibit 4A**, p. 2). The Plan document sets forth its "liability limits" (*id.*), then, in its reference to the different classes of employees protected, repeatedly refers to its "coverage" as "insurance": "... on the date his insurance becomes effective under this Plan" -- and even interchangeably refers to itself, the Plan document, as a "policy": "... on the date

his insurance becomes effective under this policy." (**Exhibit 4A**, p. 3; *accord*, pp. 4-5 -- repeatedly classifying the entitlement to benefits under the Plan as "coverage").

In all, there is nothing about the Michigan Department of Civil Service's Long Term Disability Benefits Plan that is *dissimilar* to a traditional long term disability insurance policy. Plaintiff, and the lower courts, would seek to draw a distinction between wage loss benefits paid by an employer-as-self-insurer and wage loss benefits paid by a third-party "insurer." Case law addressing medical expense coverage, as well as the underlying legislative intent of §3109a, does not support this distinction as material.

The cases on which Plaintiff and the Court of Appeals relied disallow coordination with no-fault insurance *not* on the basis that wage loss benefits were paid directly by the employer, but because the wage loss benefits were not paid pursuant to a plan that even corresponds to typical insurance coverage. Here, Plaintiff Jarrad's entitlement to disability benefits from the State's self-funded Long Term Disability Benefits Plan was essentially similar and as secure ("actuarially sound") as if his employer had chosen to fund the coverage through the purchase of insurance, as in *Rettig*, *supra*.

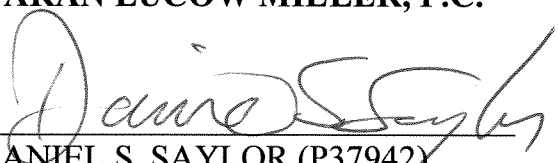
Plaintiff's coverage under the self-funded LTD Plan should be held to constitute "other health and accident coverage" within the meaning of §3109a, and fall within Defendant's right to setoff under its coordinated coverage. The lower courts erred in holding otherwise.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellant, INTEGON NATIONAL INSURANCE COMPANY, respectfully requests that the Court reverse the judgments of the Ingham County Circuit Court and Court of Appeals, and order that Defendant is entitled to summary disposition in its favor.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.



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